

Chapter Two:

The Current Legal Standing of Passive Alcohol Sensors, Legal and Law Enforcement Issues and Privacy Concerns

Chapter Two: The Current Legal Standing of Passive Alcohol Sensors, Legal and Law Enforcement Issues and Privacy Concerns

Introduction

The use of passive alcohol sensors raises a broad array of issues related to legal and law enforcement concerns as well as public policy issues that are often shaped by citizen perceptions. Therefore, this chapter will address not only the current legal standing of passive alcohol sensors in the United States and Wisconsin, but will also cover the following related considerations in the legal/law enforcement/policy arena:

- Privacy concerns regarding the use of passive alcohol sensors;
- The relationship of probable cause/reasonable suspicion to the use of the device;
- The covert nature of some passive alcohol devices;
- Admissibility of the results from a passive alcohol sensor in court;
- Use of passive alcohol sensors by law enforcement and their perceived costs and benefits;
- Usefulness of passive alcohol sensors to prosecution;
- Defense attorney arguments against passive alcohol sensors;
- The appropriateness of the results of passive alcohol sensors in expert testimony.

What is the current legal standing of passive alcohol sensors in the United States and in Wisconsin?

As of September 2002, no cases have been presented in the U.S. Supreme Court, the U.S. Appellate Courts or the Wisconsin State Supreme Court challenging the constitutionality of passive alcohol sensors. Therefore, no authoritative court ruling exists to approve or disapprove their use as a tool for law enforcement on the basis of the Fourth Amendment to the U.S. Constitution or the State Constitution. However, in the absence of a court opinion, this study applies constitutional principles and court decisions to gain some understanding of how these principles would traditionally apply to the use of passive alcohol sensors.

Wisconsin State Statutes do not specifically restrict the use of passive alcohol sensors. However, at this time, the Wisconsin State Patrol, Chemical Test Section does not recommend the use of passive alcohol sensor devices for traffic enforcement based on previous (1994) laboratory tests, which showed that a passive alcohol sensor device did not perform adequately.

The results from passive alcohol sensors cannot be used as evidence in court. Unlike an evidential breath-testing device (i.e., Intoximeter EC/IR), the results from a passive alcohol sensor cannot be used as evidence in court that a person is impaired due to alcohol consumption. A passive alcohol sensor can only be used as an indicator that alcohol is present in the area of a driver, which may lead the officer to do further testing utilizing a preliminary breath testing device (PBT), field sobriety tests or testing by an evidential breath testing device.

Why have passive alcohol sensors raised concerns with respect to privacy?

Some people in Wisconsin feel that passive alcohol sensors, or any other breath-testing device, represent an intrusion of personal privacy and that a law enforcement officer should have permission or probable cause to sample a person's breath. The privacy concerns include:

- Concerns that passive alcohol sensors constitute an “unreasonable search” during a traffic stop. Citizens have concerns that the use of technology allows law enforcement to probe further into areas for which they perceive an expectation of privacy.
- Concerns regarding the different types of technology that law enforcement in the U.S. currently possesses even if these technologies are not used in Wisconsin (e.g., thermal imaging devices, DNA sampling, photo-radar etc.). The concern focuses on the pervasive nature of the technology and what it might hold for future surveillance and enforcement. These people feel that in the broader, societal context, passive alcohol sensors represent one more piece of technology that law enforcement could use that would further erode individual privacy rights.
- Concerns regarding the covert use of some passive alcohol sensors by law enforcement. Passive alcohol sensors come in different shapes and sizes (for some examples, see Appendix B). Most passive alcohol sensors simply look like small electronic devices and were not designed to hide the fact that they are passive alcohol sensors. A few of these devices even require that the subject be instructed to blow (not into a mouthpiece, but passively) onto the device in order to obtain a reading. In these situations, the subject should be well aware that the device is in fact a testing device of some sort.

However, some passive alcohol sensors are manufactured to look like other objects (e.g., flashlights, clipboards etc.) to conceal their purpose and so are not readily identifiable to the subject/person being tested. Some citizens and privacy rights advocates will object to the fact that the passive alcohol sensor can be used in a covert manner to detect alcohol without the subject knowing that they are being tested.

What is the Fourth Amendment to the United States Constitution and how does this relate to passive alcohol sensors?

The Fourth Amendment to the U.S. Constitution protects every person in the United States from unreasonable searches and seizures. It states as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

- Fourth Amendment to the U.S. Constitution

The Fourth Amendment was written to encompass the reasonableness of search and seizures. One of the purposes of the Fourth Amendment is to afford persons with some reasonable expectation that their privacy will remain secure and unthreatened by governmental intrusion.

The Fourth Amendment, while establishing and setting forth the right of privacy and freedom from unwarranted search, also creates a need for balance with respect to traffic enforcement - the need to protect individual privacy rights versus the need to protect the public’s interest through the vigorous enforcement of drunk driving laws. Therefore, with this balancing effort as the backdrop, one of the questions to be addressed by this study is as follows:

Does the use of passive alcohol sensors as a law enforcement tool compromise the constitutional guarantees during a search as intended under the Fourth Amendment?

The United States Supreme Court and the Wisconsin State Supreme Court have not yet considered any cases involving the constitutionality of passive alcohol sensors. Thus, the above question will be addressed by focusing on each of the following legal issues while noting the applicable legal theories and principles that apply.

Does a person have a “right to privacy” in their automobile and how does this relate to the automobile exception to the Fourth Amendment?

While the United States Supreme Court generally has sought to protect the privacy of individuals under the Fourth Amendment, it has also issued several decisions recognizing that citizens should have a *diminished* expectation of privacy when inside their motor vehicles. In *Carroll v. U.S.*, 267 U.S. 132 (1925), the Court distinguished between the search of a home and the search of a vehicle and recognized that there is a diminished expectation of privacy in a vehicle⁴. In *Carroll*, the Court pointed to the fact that because a motor vehicle is movable, it can be moved out of reach of a search warrant rendering a search warrant ineffective. Therefore, warrant-less searches of motor vehicles are permitted as an exception to the Fourth Amendment. This principle is typically known as the “*automobile exception*.”

The automobile exception is based on 2 justifications:

1. vehicles are readily mobile, and
2. drivers have a lesser expectation of privacy in their automobiles than in their homes or offices.

The *automobile exception* principle allows law enforcement officers to stop and search a vehicle if there is probable cause to believe that the vehicle contains evidence of a crime and there are exigent circumstances making it impractical to obtain a warrant before a search. Every part of the vehicle can be searched, including the trunk and closed containers.

In Wisconsin, this diminished expectation of privacy has been justified through court opinions by the inherent mobility of automobiles, the periodic inspection and licensing requirements of automobiles and the public nature of automobile travel where both its occupants and contents are in plain view.⁵

Outside of Wisconsin, in *Maryland v. Dyson*, 527 U.S. 465 (1999), the U.S. Supreme Court stated that the automobile exception does not require a separate finding of exigency. All that is required for a warrant-less search of a motor vehicle is a finding of probable cause. “If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment...permits police to search the vehicle without more.”⁶

⁴ See also *Cardwell v. Lewis*, 417 U.S. 583 (1974) (finding the search of an automobile to be less intrusive than that of a home or one’s person and noting that there was a lesser expectation of privacy in a motor vehicle); see also *U.S. v. Knotts*, 460 U.S. 276, 281 (1983) (discusses how a person driving in an automobile on a public roadway has no reasonable expectation of privacy while he or she is moving from one place to another).

⁵ *State v. Weber*, 163 Wis. 2d 116 (1991).

⁶ See also *Chambers v. Maroney*, 399 U.S. 42 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *U.S. v. Ross*, 456 U.S. 798 (1982); *California v. Acevedo*, 500 U.S. 565 (1991); *Whren v. U.S.*,

It is important to note that the courts have drawn a legal distinction between the diminished expectation of privacy associated with a motor vehicle and the need for greater privacy protection afforded in the home. For example, the courts have objected to the use of certain technologies such as telescopes and thermal imaging devices that are available to the government (though not to most individuals), finding that their use requires a warrant based on the fact that they were used in situations involving a person's home. The Supreme Court in *U.S. v. Kyllo*, found that sense enhancement instruments (in this case a thermal imaging device to detect a suspected, marijuana growing operation) used to "explore details of the home that would have previously been unknowable" violate the Fourth Amendment. The court made the determination based on the presumption that use of the device is "presumptively unreasonable without a warrant."⁷

Does a passive alcohol sensor constitute a search of the subject's motor vehicle?

The Fourth Amendment to the U.S. Constitution protects persons from unreasonable searches and seizures. If a search does *not* occur or if a search is *not* unreasonable, then no constitutional protection has been violated. In order to determine whether the search of a constitutionally protected area has taken place, the courts must first determine if the subject has an expectation of privacy and second, whether that expectation of privacy is reasonable.⁸

In considering the case of a passive alcohol sensor, the expectation of privacy could be related to a person's breath, with or without measurable alcohol. A person's expectation of privacy on his or her breath does not appear to be a reasonable interpretation of the concept given the fact that a person's breath cannot be withheld from the public as part of societal life. A person's breath is not unlike facial features, voice, handwriting or fingerprints that are always on display to the public.⁹ The courts may examine whether the interest that the person would like to protect can in fact, be kept private or whether that person in ordinary society could maintain the privacy claimed.

Whatever a person knowingly exposes to the public, no matter where the location, is not subject to protection by the Fourth Amendment. In finding that there was no reasonable expectation of privacy in one's voice or face, the U.S. Supreme Court in *U.S. v. Dionisio* 410 U.S. 1 (1973) held the following:

"The physical characteristics of a person's voice, its tone and manner, as opposed to the specific content of the conversation, are constantly exposed to the public. Like a

517 U.S. 806 (1996); *Wyoming v. Houghton*, 526 U.S. 295 (1999); *Florida v. White*, 526 U.S. 559 (1999).

⁷ *U.S. v. Kyllo*, 533 U.S. 27 (2001).

⁸ See *Katz v. U.S.*, 389 U.S. 347, 361 (1967)(*Harlan, J. concurring*).

⁹ Fields, Michele and Hricko, Andrew "Passive Alcohol Sensors – Constitutional Implications", The Prosecutor, Summer 1986; pages 45-52.

*man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.*¹⁰

Therefore, following the logic found in *Dionisio*, obtaining a sample of a person's breath that already exists in full public view does not constitute "a search" within the constitutional principles of the Fourth Amendment.

Simply put, a person cannot reasonably expect that her/his expelled breath could remain private. In the case of a motor vehicle, the expectation of privacy for one's breath becomes even more diminished with respect to the automobile exception rule to the Fourth Amendment as discussed previously.

Testing to see if a search is unreasonable. Take this one step further and, *for the sake of argument*, assume that the use of a passive alcohol sensor *does* constitute a search. The hypothetical question now becomes, *is the search reasonable?*

The Fourth Amendment to the U.S. Constitution does not prohibit all searches; instead it prohibits all *unreasonable* searches. Whether a search is reasonable or not under the Fourth Amendment depends first upon a court determination that a law enforcement officer has probable cause to believe that a violation exists. This is an important point to make with respect to the use of passive alcohol sensors in Wisconsin. **According to Wisconsin State Statutes, well before breath or blood testing has taken place, and before a traffic stop can even be made, the officer must have reasonable suspicion or probable cause to believe that the driver has been consuming alcohol and may be impaired by the alcohol.** The statutory basis for the establishment of probable cause in Wisconsin states:

"(a) Notwithstanding sub. (1) A police officer, sheriff, deputy sheriff, traffic officer or motor vehicle inspector may not stop or inspect a vehicle solely to determine compliance with a statute or ordinance specified under par. (b) unless the police officer, sheriff, deputy sheriff, traffic officer or motor vehicle inspector has reasonable cause to believe that a violation of a statute or ordinance specified under par. (b) has been committed.

-Wisconsin State Statutes s.349.02(2)(a)

¹⁰ See *U.S. V. Dionisio*, 410 U.S. 1 (1973).

Caution Regarding Sobriety Checkpoints

In several states, passive alcohol sensors have been used in conjunction with “sobriety checkpoints” or roadblocks to randomly search vehicles for open containers and for the presence of alcohol in the air surrounding the driver. In Wisconsin, however, sobriety checkpoints are prohibited by Wisconsin state statutes (see Wisconsin State Statutes 349.02(2)(a) above); primarily due to concerns regarding potential abuses of individual privacy rights.

The reader should be cautioned that this report does not advocate the use of sobriety checkpoints in Wisconsin; nor does this report lay down a foundation for the statutory repeal of the prohibition. In Wisconsin, an officer must have reasonable suspicion to effect a traffic stop and probable cause before proceeding with any additional action (e.g., such as proceeding to conduct a further search for other drugs or weapons).

After probable cause is established, field sobriety testing is typically conducted by the law enforcement officer to determine whether the driver has actually consumed the alcohol and if the subject is, in fact, impaired or operating while intoxicated (OWI). The sequence of contact has become standard procedure for the arresting officer and generally includes the officer's:

- initial observation of the vehicle in motion;
- conducting a traffic stop;
- initial personal contact;
- observation of the exit sequence of a driver getting out of the vehicle;
- field sobriety tests (e.g., counting, evaluation of balance, motor functions nystagmus or eye movement);
- preliminary breath test;
- arrest and transport; and
- breath or blood alcohol test.

The use of a passive alcohol sensor device could theoretically be incorporated into this OWI traffic stop sequence at any time between *initial personal contact* and *arrest and transport*. The officer may use a passive alcohol sensor device to assist in determining the presence of alcohol before any field sobriety test or in place of a preliminary breath test device (PBT). The passive alcohol sensor represents one of the techniques that may be available to an officer during the sequence of an OWI traffic stop.

If probable cause or reasonable suspicion is established before a passive alcohol sensor is used, the probable cause requirement has been met and the law enforcement officer would be free to employ any technique, or combination of techniques of sobriety testing.

Secondly, in determining whether a search is reasonable, the courts must also balance the intrusion against the purpose served. Whether a law enforcement tool to conduct a search is considered reasonable involves the balancing of the intrusion against the promotion of a legitimate governmental interest.¹¹ Presumably, in the case of passive alcohol sensors, the interest that would be advocated by the government is that the use of the device to detect the presence of alcohol would assist in the reduction of traffic fatalities associated with alcohol impairment.

In Wisconsin in 2001, alcohol was listed as a contributing cause in 7% of all crashes and 39% of all fatal crashes. From 1976-2001, there have been 9,952 motor vehicle fatalities associated with alcohol in the state. Arguably, the government has a legitimate state interest to keep impaired drivers off the state's highways and reduce the number of fatalities. Assuming that passive alcohol sensors can, in fact, accurately detect the presence of alcohol and assist law enforcement in reducing the number of alcohol-related fatalities, the intrusion may be minimal and therefore, reasonable. Again, this argument assumes that the use of a passive alcohol sensor is initially considered a search. This assumption is debatable in light of past decisions by the U.S. Supreme Court such as in *Katz v. U.S.*, 389 U.S. 347, 361 (1967).

Is it legal to test other areas and passengers of the vehicle using a passive alcohol sensor even though it was the driver who was stopped for OWI or for another traffic violation?

Current Wisconsin Law with respect to reasonable suspicion/probable cause does not permit a law enforcement officer to question a passenger in a vehicle stopped for a possible OWI violation unless the officer has an independent reason to believe that the passenger has committed an offense. There are reasonable limitations on the extent to which an officer may question passengers in a vehicle. This concept requires a distinction between the officer having a "discussion" with a passenger and conducting an "interrogation" of a passenger.

An officer may observe that a passenger is intoxicated, but if there is no evidence that her/his intoxication is in violation of law, no further action may be necessary in relation to that passenger.¹² However, if an officer has reason to believe that the intoxicated passenger is under the legal drinking age or has violated another law, further action, including alcohol testing or questioning of that passenger would be necessary to establish probable cause for arrest. Again, reasonable suspicion/probable cause must exist before a passive alcohol sensor could be used on the driver/passenger/suspect.

¹¹ See *Delaware v. Prouse*, 440 U.S. 648, 654; (1979). See also *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976); *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

¹² See ss.968.24, "Temporary Questioning Without Arrest" and ss.968.07 (1)(d), "Arrest by a Law Enforcement Officer."

Note that under s.346.935(2), it is illegal to have open containers of alcoholic beverages (“intoxicants”) in a vehicle. The owner or driver of the vehicle is imputed with a violation of this law in addition to any other violation that may result from an OWI traffic stop.

The Plain View Doctrine and Sense Enhancement Doctrine: Exceptions to the Fourth Amendment

Two additional exceptions to the Fourth Amendment to the U.S. Constitution are the *plain view doctrine* and the *sense enhancement doctrine*. Although these exceptions are separate principles, they are closely tied to each other in terms of their application to the use of passive alcohol sensors. These two principles will be defined as they relate to law enforcement use of passive alcohol sensors as allowed under the Fourth Amendment.

The Plain View Doctrine is defined as:

“A doctrine that permits the search, seizure, and use of evidence obtained without a search warrant when such evidence was plainly perceptible in the course of lawful procedure and the police had probable cause to believe it was incriminating.

Objects falling in the “plain view” of an officer who has the right to be in the position to have that view are subject to search and seizure without a warrant or if that officer needs a warrant or probable cause to search and seize, her/his lawful observation will provide grounds thereof. The plain view doctrine is limited by the probable cause requirement: officers must have probable cause to believe that items in plain view are contraband before they may search or seize them.”

Reference: *FindLaw for Legal Professionals*

In addition to first establishing probable cause, an officer (i.e., one using a passive alcohol sensor) must meet the following required two-prong test:

(1) Does a law enforcement officer have the right to be beside or near the vehicle?

Once an officer has probable cause to make a stop, either because of a traffic violation or because of reasonable suspicion that a violation has occurred, an officer has established a legitimate reason to be beside or near the driver’s vehicle. Again, the suspect cannot rely on an expectation of privacy while inside the automobile that would preclude a law enforcement officer from walking up to the vehicle and standing beside or near it.

(2) Is it apparent that what is before a law enforcement officer is evidence of a crime?

Although an officer may have established a right to be beside or near the driver's vehicle, the plain view doctrine requires that it be evident to the law enforcement officer that what is before him or her is evidence of a crime before investigating any further.

With respect to passive alcohol sensors, if the law enforcement officer can satisfy these conditions (has a right to be near or beside the vehicle and what is apparent before the law enforcement officer is evidence of a crime), then the use of the device should meet the test and be permissible.

Closely related to the plain view doctrine is the *sense enhancement doctrine*. **This doctrine explains that law enforcement may use their senses, or an enhancement of their senses to make an assessment that there is evidence of a crime.**

The smell of alcohol is very distinct and is one very good example of how an officer can make the determination that there is apparent evidence that a person has been drinking. Another might be the visual presence of an open container.

Discovery of the smell, however, must be inadvertent. While this precludes an officer from "probing", an officer may aggressively use his or her senses. In *U.S. vs. Johnson*,¹³ the U.S. Court of Appeals for the Ninth Circuit rejected the defendant's argument that he had a reasonable expectation of privacy from drug agents with "inquisitive nostrils." The court found that when the agents would lean down to smell a suitcase from a standing position, that even this did not constitute a "search" as defined by the Fourth Amendment.

Suppose however, that the officer uses an *additional* method or device beyond his or her natural senses, such as a passive alcohol sensor, to help determine if evidence of a crime exists. Does this invade an area protected the Fourth Amendment?

The courts have frequently ruled that certain types of technologies can be used to assist an officer to sense evidence of a crime while remaining within the boundaries of the Fourth Amendment. For example, the use of drug-sniffing dogs has been found constitutional because the dog is considered an extension of the officer's natural senses.¹⁴ Similarly, x-ray machines are commonly used at airports to examine the contents of luggage. X-ray machines have become accepted technology in the majority of countries throughout the world in order to prevent the spread of terrorist

¹³ *U.S. v Johnson*, 497 F.2d 397 (9th Cir. 1974)

¹⁴ *U.S. v. Place*, 462 U.S. 696, 707 (1983)(finding the use of a police dog to enhance the senses of the police officer in the detection of narcotics did not violate the Fourth Amendment).

activity. Even before the 9-11-01 terrorist events, the courts have also affirmed the reasonableness of using x-ray machines¹⁵.

Note that when these methods (including passive alcohol sensors) are used, the nature of the evidence is not affected. For example, applying the sense enhancement doctrine, no distinction is made as to whether the alcohol is sensed by a passive alcohol sensor or by the officer's nose – the evidence is still present and has not been altered no matter which method is used. Again, the technology is used as a means to enhance a law enforcement officer's ability to sense apparent evidence in the automobile in which the courts have determined that there is a diminished expectation of privacy.

From the legal perspective, should the subject's inability to easily identify the passive alcohol sensor as a breath-testing device be of concern to the courts?

Passive alcohol sensors come in many shapes and sizes. A style typically used by law enforcement agencies in Wisconsin is the flashlight or baton-shaped PAS¹⁶. Other forms include clipboard-like devices and shapes that resemble small electronic devices. Because the devices appear to be something other than a testing device, they are not readily identifiable by the suspect as an alcohol-detecting device. As a result, those who are concerned with individual privacy rights object to the fact that these devices are intended to be used in a covert manner to detect alcohol without the subject knowing that they are being tested.

Privacy is a principle that is held in high regard by citizens in Wisconsin. This is reflected in a random, statewide survey of Wisconsin residents by the University of Wisconsin Survey Center¹⁷. According to the survey, 61% indicating that passive alcohol sensors were a valuable tool. However, 33% indicated that use of a passive alcohol sensor represented an infringement of privacy rights.

From a strictly legal, constitutional perspective, there does not appear to be a requirement that the officer must provide notification to the driver that the covert device is a passive alcohol sensor which will be used to obtain a sample of the subject's breath. However, if passive alcohol sensors were to be used by law enforcement, a set of policies in place that requires such notification may make sense as a matter of promoting the public's trust in law enforcement. As part of the two focus group sessions conducted by the Wisconsin Department of Transportation in September, 2002, several law enforcement officers and legal experts expressed the need to have a local policy in place that would require an officer to properly notify drivers that a passive alcohol sensor is being used to obtain a sample of their breath.

¹⁵ *U.S. v. Smith*, 643 F.2d 942, 944-45 (2d Cir. 1981) (finding that the use of x-ray machines reasonable when weighed against the possibility of hijacking).

¹⁶ The PAS devices resembling flashlights (i.e. PAS III) were used by law enforcement in the following municipalities and counties: Dane County, Elkhart Lake, City of Green Bay, City of Manitowoc, City of Waukesha, Village of Whitefish Bay.

¹⁷ *2002 Department of Transportation Omnibus Study*, University of Wisconsin Survey Center (September 19, 2002)

If the passive alcohol sensor detects alcohol near an open bottle of intoxicants in the motor vehicle, but not visible to the law enforcement officer conducting or assisting the traffic stop, does this discovery of the open bottle still fall into the “plain view” doctrine?

Legal Focus group participants were queried via email to address this issue, which was not discussed during the focus group session. The following are their responses:¹⁸

“It would not be in plain view because [the officer did] not see the bottle – I assume it was found only after a search pursuant to the sensor indicating the presence of alcohol. The plain view doctrine only “kicks in” for things that are seen without any kind of manipulation or search.”

“I do not believe that a concealed container can properly be deemed in plain view when it is detected with such a sensory aid.”

“It is unclear ...how plain view applies to the open container if the officer does not see it as set forth in the facts. If the container is found during a subsequent search as a search incident to arrest or perhaps even as a consent search then there is no problem. Plain view doctrine does not apply. If the question is really what happens if an open container is subsequently located and that arguably the open container is what caused the passive alcohol sensor to alert the officer, I still don’t see a problem as the officer would still have to conduct his investigation including making his own observations regarding signs of intoxication including field tests before an arrest is made...use of the passive alcohol sensor does not qualify as a search, and therefore, no constitutional questions arise.”

“The question you pose in your letter is a difficult one to answer without more information. For example, we are told by proponents of these sensors that they had to be in reasonably close proximity to the alcohol in order to detect its presence (i.e., that the sensor would not have to be stuck up a driver’s nose, but would have to be in an officer’s hand in close proximity to the open window of a car when questioning the driver). If this is true, it makes me wonder how the sensor is going to detect alcohol that is not visible to the officer without being waved around the interior of the vehicle. That “waving around” sounds suspiciously like an illegal search in the first place.”

“Whatever your intended fact situation might be, your question involves the more fundamental issue: Does this discovery fall under the “plain view” doctrine? I believe it does not. The only way in which the sensor will detect alcohol “near” an

¹⁸ **Staff Note:** The issue related to the open bottle in a vehicle was answered differently than other questions because the legal focus group did not address it at the September 11, 2002 session due to time constraints. In order to eventually have the question answered, WisDOT sent out a separate request to the legal focus group and received four responses. Note that this is a very narrow, legal question that may ultimately be answered in court and not in this paper. The question was not addressed specifically at the law enforcement focus group for the same reason and because it is essentially a legal question.

open bottle that is not visible to the officer is by activity beyond the appropriate scope or permitted conduct. My answer may be influenced by my strong belief that these sensors should not be employed in Wisconsin law enforcement."

"This question raises two issues:

1) The prohibition against having open intoxicants in a vehicle under s. 346.935; and 2), The "plain view" exception to the warrant requirement justifying a search and seizure.

First, the statute is clear in this respect. Section 346.935(2) prohibits a person from possessing on his or her person while in a vehicle on a public highway any bottle or receptacle containing alcohol beverages if the bottle or receptacle has been opened, the seal has been broken or the contents have been partially removed or released. Further, subparagraph (3) prohibits the vehicle owner or driver of the vehicle, if the owner is not present, to have any bottle containing alcohol in the vehicle if the bottle has been opened or the seal has been broken. While sub. (3) states that the prohibition does not apply if the bottle is kept in the trunk of the vehicle, it does not otherwise specify that the bottle has to be easily visible. The bottle must be in some area of the vehicle that is normally occupied by the driver and passengers. In other words, the bottle could be under the seat or in a utility compartment or even the glove box, for that matter. Therefore, in my opinion, the statute gives an officer who detects the odor of intoxicants whether by olfactory senses or by PAS the authority to investigate under Terry v. Ohio, 392 U.S. 1 (1968) a possible violation of sec. 346.935.

Second, the "plain view doctrine" is an exception to the Fourth Amendment's warrant requirement to conduct a search. The necessary elements of this exception are:

1) The evidence must be in plain view. (This can include evidence that an officer recognizes through any of his or her senses; e.g., smell.);

2) The officer must have a prior justification for being in the position from which he or she discovers the evidence in "plain view," and

3) The evidence seized "in itself or in itself with facts known to the officer at the time of the seizure, [must provide] probable cause to believe there is a connection between the evidence and the criminal activity." State v. Guy, 172 Wis. 2d 86 (1992).

Although I do not think that using an officer's senses; e.g., nose, or a PAS constitutes a search for Fourth Amendment purposes, I will apply the "plain view doctrine" for the sake of argument. The use of a PAS suggests to me that the officer stopped the vehicle for a legitimate purpose. Thus, element no. 2 is satisfied given that a valid traffic stop will provide the "prior justification" for the officer being in a position to discover the evidence in "plain view." Element no. 1 addresses the given scenario that while the bottles may not be "visible," they could still technically be in "plain view" if picked up by the PAS or the officer's nose. Element no. 3 is clearly satisfied

because the detection of an open intoxicant will certainly provide probable cause to believe that sec. 346.935 has been violated.

Therefore, applying the statute's unequivocal prohibition and the "plain view doctrine," an open bottle that is inside a motor vehicle in an area normally occupied by the driver and passengers while operated on a highway, but not visible, could be legally "discovered" by a police officer."

State Law, Law Enforcement Policy and Public Perceptions

Despite the fact that passive alcohol sensors may be considered “constitutionally acceptable”, many policy issues still remain with respect to “public acceptance” of the devices. In considering the use of passive alcohol sensors, state law and law enforcement policy is frequently influenced by the tension between people’s perceptions of the devices, and the public’s desire to foster safe highways. These competing concerns, which are routinely brought forth by various constituencies and groups, are typically balanced against each other by the legislature when creating new legislation.

State law, law enforcement policy and public perceptions were among the topics addressed by the two focus groups convened by the Wisconsin Department of Transportation to assist in studying passive alcohol sensors. These two focus groups – the Legal Focus Group¹⁹ and the Law Enforcement Focus Group²⁰ - met separately in September, 2002, to respond to specific queries on passive alcohol sensors and their use at OWI traffic stops in Wisconsin.

Note that a full listing of all the comments received from both focus groups can be found in Appendix C.

In addition, the results from the 2002 Wisconsin Survey Center “Omnibus” survey, a randomized sampling of Wisconsin residents that included several questions on the public’s perceptions of passive alcohol sensors, are also provided on Page 42. These perspectives may be considered with respect to proposed changes in state statutes or in the development of administrative rules governing the use of passive alcohol sensors.

¹⁹ The legal focus group, composed of members of the legal community, was selected on the basis of their interest in passive alcohol sensors in relation to the legal profession and/or possible experience with their use in Wisconsin.

²⁰ The law enforcement focus group, composed of members of the law enforcement community, was selected on the basis of prior knowledge or use of passive alcohol sensors, interest in possible uses of the devices, or the type of law enforcement agency each member represented.

Trends and perceptions of alcohol-related crashes and fatalities

- Statistics that indicate a downward trend in the number of alcohol-related deaths over several decades may lead some to question whether passive alcohol sensor use is really needed;
- The problem of alcohol-related crashes may need to be better defined to enable a better identification of the tools and technology needed to address the problem.
- Though there has been a decline in alcohol-related fatalities, each one still represents a tragedy to the families and people who are affected by them; the issue must still be addressed.
- The decline in alcohol-related deaths is due to new laws, fines, and court cases that provide more tools for law enforcement to use in enforcing OWI laws.

“The use of passive alcohol sensors should not be banned”

- The decision for the use of passive alcohol sensors should be left to each individual community or law enforcement agency.
- Banning passive alcohol sensors statewide would not serve a constructive purpose. Communities with financial flexibility or more aggressive approaches to technology may choose to use passive alcohol sensors.
- There is the possibility that varying use of the devices among individual communities could create a negative situation involving “selective enforcement” where a “rich” community could target poor people or a member of another race.

“Costs versus benefits”

- From a cost/benefit point of view, passive alcohol sensors appear to provide minimal benefit. The money would be better spent to advance other technology or to enhance other programs that are shown to be more effective in reducing drinking and driving.
- Although passive alcohol sensors are constitutionally permissible, they do not represent a “silver bullet” in the enforcement of drunk driving laws or in efforts at reducing alcohol-related crashes and fatalities.
- Passive alcohol sensors represent one of many tools available for traffic enforcement.

The use of passive alcohol sensors in the courts – value to prosecutors, defense and in expert testimony

- From a prosecutor’s viewpoint, passive alcohol sensors are not expected to have a big impact on the number of OWI convictions.
- Law enforcement may not like having passive alcohol sensors as an additional tool that they must document and justify during cross-examination in court. This testimony may include a justification of why the device may *not* have been used as well as to *how* it was used.
- Use of the device may provide an additional defense argument in court (defense could attack the use and credibility of passive alcohol sensors utilizing expert testimony which could be counterproductive).
- There is concern that some law enforcement officers would lose credibility because of the perception that a tool is needed to smell alcohol.

“Probable cause is an important fixture in Wisconsin and should be considered when using passive alcohol sensors”

The group emphasized law enforcement adherence to the mandate of “probable cause/reasonable suspicion” before an officer conducts an OWI traffic stop.

“Perception of Intrusiveness”

The perception of how intrusive the device *could* be was an important consideration for many focus group members. The “public” not only represents those who are concerned about reducing alcohol-related crashes, but also those who are interested in protecting privacy rights.

Sobriety Checkpoints

In some states (e.g. Illinois), methods such as sobriety checkpoints are tolerated by the general public as a tool for reducing alcohol-related crashes and fatalities because of a general concern over impaired driving. However, due to the political climate and constituent concerns, sobriety checkpoints are not currently permitted by Wisconsin statutes. They are often perceived as giving the government a “blank check” to invade someone’s privacy.

“Privacy should be seen in the ‘broader context’”

- Passive alcohol sensors can constitute an unreasonable search because, in the broader, societal context, they represent one more tool in a broad continuum of tools used by law enforcement for conducting an investigation or conducting surveillance on private citizens.
- Acceptance of passive alcohol sensors could create a “slippery slope” or a “Big-Brother” effect in which privacy rights are eroding away over the long-term. The public is becoming increasingly concerned about this problem and government should be very careful about “setting precedents” or “creating permissions” that would take away fundamental privacy rights.
- Technology has progressed to the point that it has “gotten ahead of privacy laws.”
- Passive alcohol sensors would “not be used in every home” and have limited usefulness.
- There is concern that the use of passive alcohol sensors would be much different if it were discussed more broadly and not specific to traffic stops, but rather applicable to teen alcohol parties and group events.

“Is technology going too far?”

- Requiring photo identification with fingerprints is an example of law enforcement efforts going too far.
- It was now even possible for a DNA sample to be collected by an officer using a saliva swab from the inside of a person’s mouth.
- If the public has the perception that passive alcohol sensors are too intrusive, then it becomes overly burdensome to defend their use in court.
- The results of a passive alcohol sensor are not admissible as evidence in court (a passive alcohol sensor cannot measure exact quantity of alcohol) eliminating its importance to the judicial process.
- Much of the technology is too expensive for local government to afford which may deter its purchase and use by individual agencies. Thus, the technology is really not that pervasive in society.

Concerns over potential abuses of passive alcohol sensors

- There is concern that the passive alcohol sensor could detect alcohol that had been spilled by a passenger, but not consumed by the driver, or that the passenger might be impaired yet the driver would be suspected of drinking alcohol.
- There is concern that law enforcement could use the sensors in conjunction with the targeting of specific motorists, leading to further interrogations of the driver and passengers (i.e. “profiling”).
- There is concern that having a flashlight “stuck in a subject’s face” could be intimidating, even though the PAS flashlight can be used at a distance of 10 inches from a person’s mouth. (required distances from a subject’s mouth vary from 3 to 10 inches depending upon the type of passive alcohol sensor device used).
- Even routine traffic stops were “traumatic events” suggesting that use of a passive alcohol sensor at a traffic stop adds to that trauma.

How do passive alcohol sensors compare to other law enforcement technology like x-ray machines?

- The public already must contend with other “intrusive” technology that is designed to protect them such as x-ray machines at airports and radar used for enforcing speed; this technology is not much different.
- One participant stated a passive alcohol sensor represented an enhancement or extension of the officer’s own senses “like an officer’s binoculars.”
- A passive alcohol sensor may be no more or less intrusive than these examples and the public is accustomed to and even expects law enforcement officers to use technology for enforcement at a traffic stop (e.g., PBTs, Intoximeter EC/IR).
- Since the terrorist attacks on 9/11/01, the public seems to be more open to having more security and more “tools.”
- A major difference between a passive alcohol sensor and other technology is that a passive alcohol sensor is sensing alcohol, which is a *legal* substance (as long as the amount is at the legal limit) in today’s society and that is where the intrusion lies. Whereas, other technology is often looking for illegal items such as bombs or drugs. That introduces the concept of absolute sobriety as the minimum BAC level for drivers.

“Guidelines would be helpful for law enforcement officers”

- It would be helpful to have a set of guidelines and policies for law enforcement on how and when to use passive alcohol sensors.
- The driver/violator should be given reasonable notice by the law enforcement officer that the device will be used to detect alcohol on that person.
- Ultimately, the passive alcohol sensor is used at the discretion of the officer.

**Legal and Policy Concerns Stated by the Law Enforcement Focus Group,
September 4, 2002, DSP Headquarters, Fond du Lac, Wisconsin**

“Probable cause is important in Wisconsin”

- The use of passive alcohol sensors is a “chicken/egg issue.” A passive alcohol sensor is “only effective if probable cause exists first”. Since the state legislature is more interested in when and how the device is used with respect to probable cause, the use of a passive alcohol sensor after the stop is made may be less likely to create concern with whether the device can be used or not. If it appears that law enforcement using the device on a deceptive basis, the legislature would probably ban its use.
- The legislature should be better informed about how the device would be used.
- All law enforcement officers should be trained in the proper and legal use of the device to minimize legal problems with how it was used.

“Not necessarily cost effective, but lets keep our options open”

- Compared to other tools (e.g., preliminary breath devices, Intoximeter EC/IR) passive alcohol sensors were not as good or as cost effective. However, this is not reason enough to “ban their use” because there are particular situations where passive alcohol sensors may be useful.
- Having these devices should at least be an option for the officer. The decision as to whether these devices are seen as “cost effective” or not should be left up to the individual law enforcement agencies.
- It is probably not economical to have a device in every law enforcement vehicle.

“Fourth Amendment and Plain View Doctrine”

- From a legal perspective, a law enforcement officer should have no problem using passive alcohol sensors as long as they are used within the legal rules of probable cause and the plain view doctrine. Within these boundaries, a passive alcohol sensor is considered “an extension of the law enforcement officer’s own senses” (e.g., binoculars).
- If properly trained, the law enforcement officers can use the device within the limits of the law enabling the public to understand the need for the device. As a result, passive alcohol sensors may not be contested in court.

Legal standing of passive alcohol sensors

- Arrests are not made solely on the basis of the reading from a passive alcohol sensor device. Results from a passive alcohol sensor are not admissible in court and can only be used as just one indicator of the presence of alcohol in a long series of sobriety tests conducted during traffic enforcement.

The nature of the evidence is not changed through the use of a passive alcohol sensor. Alcohol is present without regard to how it is sensed, either by the device or with the nose.

“Covert uses” of passive alcohol sensors.

- There is extensive concern regarding the use of “covert types” of passive alcohol sensors on juveniles or at schools because it creates the perception among parents that officers were being “sneaky.”
- It is important to deal with the public on a “professional level,” suggesting that the use of passive alcohol sensors in a covert manner is contrary to standard practice because it could betray the public’s trust. Deceptive tactics create problems over time and produce poor public relations.
- It is good policy for law enforcement to inform the motorist if the passive alcohol sensor is being used to sense the presence of alcohol.
- There are other devices on the market that look like electronic devices and are not designed to be covert.

\

Legislative Initiatives

- The state legislature could pass a law requiring a trial phase in which a selected number of law enforcement agencies could test the device and collect data on its accuracy and effectiveness.
- Guidelines on the proper use of passive alcohol sensors (including training) for all law enforcement agencies would help.
- Opposition to banning the devices altogether to permit the technology to develop and improve over time as the law enforcement officers continue to use them.

“Training is essential”

- Training is essential for the correct use of passive alcohol sensors.
- Training must include focus on the legal requirements of using a passive alcohol sensor (e.g., “plain view doctrine”, “probable cause”) as well as technical requirements for using the tool.
- Training is important to maintain professional standards and to ensure that the passive alcohol sensor is not the only tool that was used to determine whether a suspect had been drinking or not.

<i>Legal and Policy Concerns from the General Public: Results of the 2002 Omnibus Survey Questions Re: Passive Alcohol Sensors</i>

The 2002 Department of Transportation Omnibus Study was conducted by the University of Wisconsin Survey Center (UWSC) for the Wisconsin Department of Transportation.

The UWSC is a department of the College of Letters and Science at the University of Wisconsin-Madison. Funding for the UWSC is provided by the College and from revenue generated by contractual work.

The goal of this study was to interview 750 randomly selected men and women in households throughout the State of Wisconsin to gather residents’ opinions on a wide range of state transportation safety issues. Only Licensed Drivers were interviewed, so households that included no licensed drivers were screened out and the interview was terminated. These accounted for only 3.3% of the households where contact was made. The UWSC fielded a sample of 3000 randomly generated Wisconsin phone numbers. This random phone sample was obtained from Survey Sampling, Inc.

Interviewing for the 2002 Department of Transportation Omnibus Study began on July 23, 2002, and ended on September 4, 2002. The UWSC completed a total of 770 interviews at an average length of 18.07 minutes per interview. The overall response rate for the survey was 55.30%. The following provides the results of three questions from the survey focusing specifically on public perceptions of passive alcohol sensors.

Passive Alcohol Sensor Questions from 2002 Wisconsin Omnibus Survey

- 1) Some people feel that law enforcement officers should have sniffers available to them as a tool to use in the process of investigating someone for drunk driving. Others think this kind of tool is an infringement of privacy rights. How do you feel about the use of sniffers? Would you say this is a valuable tool, or an infringement of privacy rights?

(Interviewer: Do not read categories)

No.	%	
469	60.9	Valuable Tool
252	32.7	Infringement of Privacy Rights
4	0.5	Don't care either way (volunteered)
15	1.9	Both, but lowering drunk driving makes it acceptable
16	2.1	Other

- 2) Are you aware of a situation in which YOU may have been tested by a Wisconsin law enforcement officer using a sniffer?

No.	%	
13	1.7	Yes
751	97.5	No
6	0.8	Other

- 3) Were you operating a vehicle at that time, were you a passenger in a vehicle, or was it some other kind of situation?

No.	%	
757	98.3	Missing values (N/A)
9	1.2	Operating a vehicle
2	0.3	Passenger in a vehicle
2	0.8	Some other situation